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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1179

CHARLES SELLERS, RICHARD STROHMAN, and BRUCE KIMMEL, individually and as members of the Campus Draft Opposition, on behalf of themselves and others similarly situated,

Petitioners,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court dismissing the action (R. 168-171) is not reported. The earlier Memorandum of Decision of the District Court denying

plaintiffs' application for a preliminary injunction (R. 114-116) is set forth as Appendix B to the Petition for Certiorari. The opinion of the Court of Appeals for the Ninth Circuit (Appendix A of Petition) is reported at 432 F.2d 493.

JURISDICTION

Petitioners seek review by this Court pursuant to 28 U.S.C. §1254(1) (Petition 2). The sole basis for seeking to invoke the jurisdiction of the District Court in this case is the Civil Rights Act of 1871, 28 U.S.C., §1343 and 42 U.S.C., §1983. (R. 2, lines 18-23.) For the reasons discussed below, and as was held by the Ninth Circuit (432 F.2d at 500), respondent The Regents of the University of California is not a "person" within the meaning of 42 U.S.C., §1983. Accordingly, the complaint fails to state a claim for relief against respondent.

QUESTIONS PRESENTED

1. Is The Regents of the University of California, as a governmental instrumentality of the State of California, a "person" within the meaning of 42 U.S.C. §1983?

2. May a state university deny permission to a student organization to use a major campus facility such as a greek theatre for the holding of a "Vietnam Commencement" in circumstances where, because of

the background and format of the proposed "commencement", it would be widely regarded as being a University ceremony if held in such a campus facility?

3. May a state university deny the request of a student organization for the reservation of a campus facility where it reasonably appears that the proposed event would involve conduct in violation of law?

REGULATIONS OR POLICIES INVOLVED

1. Resolution of The Regents of the University of California adopted on October 20, 1967, that:

> "University facilities shall not be used for the purpose of organizing or carrying out unlawful activity." (R. 2, lines 6-13.)

2. Resolution of The Regents of the University of California adopted on April 19, 1968, that:

> "The Regents have received from the Campus Draft Opposition an appeal from the denial of its application to use the Hearst Greek Theatre on the Berkeley campus for the holding of a 'Vietnam Commencement' on May 17, 1968.
>
> "After giving full consideration to the appeal and materials submitted in support of it and the opinion of General Counsel that violations of law will occur in the course of the event if held as proposed, and it appearing that because of the history and format of the proposed 'Commencement' it would be widely regarded as being a University ceremony if held on the campus, it is the determination of The Regents that per-

mission should not be granted for the holding of the proposed 'Vietnam Commencement'.

"For these reasons, The Regents hereby deny the appeal of the Campus Draft Opposition." (R. 6-7 and 102.)

STATEMENT OF THE CASE

This case was brought by Petitioners as members of an unincorporated association known as the "Campus Draft Opposition" seeking to compel the Respondent, The Regents of the University of California, to permit the Campus Draft Opposition to use the Greek Theatre of the Berkeley Campus of the University of California for the holding of a "Vietnam Commencement" on May 17, 1968 (R. 1-11).[1] After the submission of briefs and oral argument, the District Court, *acting* through the Honorable William T. Sweigert, on May 16, 1968, issued a Memorandum of Decision denying the preliminary injunction sought by the Campus Draft Opposition (R. 114-116). The Memorandum of Decision states:

> "Essentially, the preliminary injunction is denied upon the ground that the plaintiff Committee has failed to show that, absent such preliminary injunction, it will sustain irreparable injury; that plaintiff Committee has failed to show that the refusal of their application by the Chancellor on May 14th and affirmance of that refusal by the Board of Regents on April 19th, was not a rea-

---

[1] For convenience of reference in this brief, petitioners sometimes will be referred to as the "Campus Draft Opposition" and respondent will be referred to as "The Regents" or the "University". (F.R.A.P. Rule 28(d).)

> sonable exercise of the powers vested by the law of California in the Board of Regents and, through that Board, in the Chancellor; that plaintiff Committee has failed to show that any claimed limitation upon their First Amendment rights of freedom of speech and assembly, resulting incidentally from the refusal to permit the 'Commencement' as proposed, is not reasonably justified by the valid interest of the University in maintaining good order and decorum on its campus." (R. 115-116.)

Thereafter, on July 19, 1968, the Campus Draft Opposition filed an Amendment to Complaint requesting that a three-judge court be convened to enjoin and restrain enforcement of (1) 50 U.S.C. App. §462(a) which makes it a criminal offense to knowingly counsel, aid or abet another to refuse or evade registration or service in the armed forces or to conspire to do so, and of (2) the University's policy that "University facilities shall not be used for the purpose of organizing or carrying out unlawful activity." (R. 117-119.) After the submission of further briefs and oral argument, the District Court, acting through the Honorable Lloyd H. Burke, on September 25, 1968, issued its Order denying the request for the convening of a three-judge court and granting the University's motion to dismiss (R. 168-171).

The decision of the District Court was affirmed by the Court of Appeals for the Ninth Circuit by its decision entered on September 17, 1970, Judge Pro-Tem Ferguson dissenting. (432 F.2d 493.) In essence, the Court of Appeals held that the University acted

properly in denying permission for the event since it was reasonable to anticipate that violations of the counselling, aiding and abetting provisions of the Selective Service Act (50 U.S.C. App. §462(a)) would occur in the course of the program (432 F.2d at 499). As an alternative basis for its decision, the Court of Appeals held that the action was not maintainable against The Regents of the University of California since, as an instrumentality of the State of California, it is not a "person" within the meaning of 42 U.S.C., §1983. (432 F.2d at 500.)

ARGUMENT

The determinative issue in this case, which is completely ignored by Petitioners, is whether The Regents of the University of California, a California constitutional corporation, is a "person" within 42 U.S.C. §1983, the statute upon which Petitioners rely as the basis for their claim for relief. (R. 2, lines 18-23.) For the reasons and upon the authorities discussed below, it is abundantly clear that Respondent The Regents of the University of California is not a "person" within 42 U.S.C., §1983 and therefore that this action brought under that statute was properly dismissed.

In addition, the denial of permission to use the Greek Theatre for the holding of the proposed "Vietnam Commencement" was within the discretionary authority of The Regents and was fully justified by valid and subordinating interests of the University. As dis-

counsel below (except for some last minute changes by petitioners), the entire history of the planning and advance publicity of the proposed "Vietnam Commencement" was one of deliberate imitation of the University's own commencement ceremony. In these circumstances, it is clear that The Regents acted reasonably and appropriately in declining to permit the use of a major campus facility for what was clearly a calculated effort of unfairly exploiting the prestige of the University.

Further, and for the reasons discussed below, the conclusion that the program of the proposed "Vietnam Commencement" would involve violations of the counselling, aiding and abetting provision of the Selective Service Act was not only reasonable but imperative based upon the Petitioners' own published statements of their plans for the event.

Finally, and contrary to Petitioners' assertion, the decision in this case is readily distinguishable from and does not conflict with recent "speaker ban" cases.

I.

THE DECISION BELOW IS CLEARLY CORRECT

A. The Regents of the University of California is not a "Person" Within 42 U.S.C. §1983.

Petitioners base their claim for relief solely upon the Civil Rights Act of 1871, 42 U.S.C. §1983. (R. 2, lines 18-23.) The California Constitution establishes "The Regents of the University of California" as the corporate governing body of the University of Cali-

fornia, which is a public trust, and as an instrumentality of the State of California.

California Constitution, Art. IX, §9;

Ishimatsu v. Regents of the University of California (1968) 266 Cal.App.2d 854, 863-864, 72 Cal.Rptr. 756 ("The Regents have been variously described as 'an institution of the state,' 'a public corporation,' and 'a governmental agency,' . . . a 'public trust,' and 'a governmental institution,' . . . 'a constitutional department or function of the state government,' . . . 'a governmental function' . . . 'a state institution' . . . and 'a branch of the state itself.'").

Thus, there can be no doubt that The Regents of the University of California is an instrumentality of the State of California. Indeed, Petitioners concede as much. Thus, the complaint herein states:

> "Defendant [The Regents] is a governmental unit of the State of California recognized as a corporation by Article IX, section 9 of the Constitution of the State of California and endowed thereby with governance of the various campuses of the University of California including the University of California at Berkeley." (R. 1-2.)

42 U.S.C., §1983 applies only against a "*person*" who "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory", subjects another to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." (Emphasis added.)

It is well-established that 42 U.S.C. §1983 does not create a claim for relief cognizable in the federal courts against states or state instrumentalities.

Monroe v. Pape (1971) 365 U.S. 167, 191, 5 L.Ed.2d 492, 507 (city as an instrumentality of the state);

Zuckerman v. Appellate Div., Sec. Dept., S. Ct. of St. of N.Y. (2 Cir. 1970) 421 F.2d 625, 626 (Appellate Division of Supreme Court as a part of the judicial arm of the State of New York);

United States ex rel. Gittlemacker v. County of Philadelphia (3 Cir. 1969) 413 F.2d 84, 86, cert. denied, 396 U.S. 1046, 24 L.Ed.2d 691 (County of Philadelphia and Commonwealth of Pennsylvania);

Diamond v. Pitchess (9 Cir. 1969) 411 F.2d 565, 567 (State of California and County of Los Angeles);

Whitner v. Davis (9 Cir. 1969) 410 F.2d 24, 29 (State of Washington and Central Washington State College as instrumentality of the state);

Bennett v. People of State of California (9 Cir. 1969) 406 F.2d 36, 39, cert. denied, 394 U.S. 966, 22 L.Ed.2d 568 ("... state agencies such as the California Adult Authority and the California Department of Corrections, which are but arms of the state government, are not 'persons' within the meaning of the Civil Rights Act.");

Deane Hill Country Club, Inc. v. City of Knoxville (6 Cir. 1967) 379 F.2d 321, 324, cert. denied, 389 U.S. 975, 19 L.Ed.2d 467 (City of Knoxville and Tennessee Attorney General);

Lee v. People of the State of Illinois (7 Cir. 1965) 343 F.2d 120 (City of Chicago Police Department and People of the State of Illinois).

Nor is it significant that petitioners cite 28 U.S.C. §1343 as a basis for jurisdiction. (R. 2, lines 18-23.) 28 U.S.C. §1343(3) is only a procedural jurisdictional statute which authorizes federal courts to hear cases where a substantive claim for relief is granted by some other statute such as 42 U.S.C. §1983. Section 1343(3) does not of itself create any substantive claim for relief.

28 U.S.C. §1343(3) and 42 U.S.C. §1983 both derive from the Civil Rights Act of 1871.

Monroe v. Pape (1961) 365 U.S. 167, 171, 5 L.Ed.2d 492, 496 (42 U.S.C. §1983);

Hague v. Committee for Industrial Organization (1939) 307 U.S. 496, 508 fn. 10, 83 L.Ed. 1423, 1433 fn. 10 (28 U.S.C. §1343(3)).

28 U.S.C. §1343(3) is the "parallel jurisdictional provision" to the substantive claim for relief provided for in 42 U.S.C. §1983.

Hart and Wechsler, *The Federal Courts and the Federal System* (1953) p. 829.

See also,

Loux v. Rhay (9 Cir. 1967) 375 F.2d 55;
Williford v. People of California (9 Cir. 1965) 352 F.2d 474.

B. Denial of Permission to Use the Greek Theatre for the Holding of the Proposed "Vietnam Commencement" Was Fully Justified by Valid and Subordinating Interests of the University.

As determined by the District Court, the denial of permission to use the Greek Theatre on the Berkeley campus of the University of California for the holding of the proposed "Vietnam Commencement" on May 17, 1968, "was based upon the alternative and independent ground '. . . that because of the history and format of the proposed "Commencement" it would be widely regarded as being a University ceremony if held on the campus . . .'" (R. 169-170.)

Thus, an independent reason for The Regents' denial of permission was that the holding of the "Vietnam Commencement" at the place and time and in the manner proposed by petitioners would unfairly exploit the prestige of the University. The record shows that from the outset the Campus Draft Opposition intended to give the appearance that its "Commencement" was either a University function or that it was supported by the University. Thus, the "Tentative Plan" of the Campus Draft Opposition for the "Commencement" (R. 96) included a procession from the Campanile to the Greek Theatre, music at the entrance of the procession into the Greek Theatre, invocation, introduction and presentation of the Sup-

port Pledge, the main speaker, the presentation of Honorary Degrees, the introduction to and the presentation of the Pledge to Refuse Induction, the rising and drawing near of all pledge signers, the benediction and the recessional.

Although the Campus Draft Opposition later indicated it would alter the program by deleting the academic procession, academic gowns and the conferring of honorary degrees (R. 5), that would have been only the deletion of the most glaring imitations of the University's Commencement. The ceremony still would have been denominated a "Commencement" and its basic format would have simulated the traditional University Commencement. The selection of the Greek Theatre, a facility traditionally used for ceremonial University events, and the scheduling of the event near the time of the University's own Commencement strongly suggest the attempt to indicate University involvement.

Further, the intent to simulate the University's Commencement is expressly stated in the petitioners' handout entitled "Campus Draft Opposition: An Introduction" (R. 105) which states:

> "The commencement will resemble, in its general outlines, the traditional formal university graduation. We hope to attract nationally-known speakers and to present our own honorary degrees to men and women who have taken noteworthy public stands in the cause of ending American involvement in Vietnam. In choosing such a ceremony, with its attendant academic symbolism, the CDO intends to stress the intel-

> lectual and moral integrity of the act of refusing to serve. Like the traditional graduation, this ceremony will focus the attention of the surrounding community on the students' world of ideas and needs. Thus we will encourage students to invite parents, relatives, friends, etc. to this convocation as they would to a traditional graduation."

The University's objection to the holding of the "Commencement," at the time and place and in the manner proposed by petitioners, involved at most only an incidental restriction upon petitioners' freedom of expression and association. Any such incidental restriction was fully justified by the University's valid and subordinating interest in the matter. The University's denial of permission in these circumstances is analogous to the regulation of conduct, although intertwined with expression, which has been upheld by recent decisions of this court:

> *Cox v. Louisiana* (1965) 379 U.S. 559, 563, 13 L.Ed.2d 487, 491 ("The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited.");
>
> *Adderley v. Florida* (1966) 385 U.S. 39, 48, 17 L.Ed.2d 149, 156 ("The 'concept of constitutional law' that 'people who want to propagandize protests or views have a con-

> stitutional right to do so whenever and however and wherever they please' was 'vigorously and forthrightly rejected in two of the cases petitioners rely on . . . We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.").

As in *Cox v. Louisiana*, supra, the action of The Regents in this case ". . . is a valid law [regulation] dealing with conduct subject to regulation so as to vindicate important interests of society [and in particular of the University] and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." (379 U.S. at 564, 13 L.Ed.2d at 492.)

The University's interest in preventing exploitation of its prestige and maintaining the integrity of its own commencement ceremony are, on the facts of this case, important interests deserving recognition and vindication. As expressed in *Goldberg v. Regents of the University of California* (1967) 248 Cal.App.2d 867, 880, 57 Cal.Rptr. 463:

> "Historically, the academic community has been unique in having its own standards, rewards and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interference. To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the

educational institutions, nor the ultimate advantages that society derives therefrom. *Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in large measure, be left to the educational institution itself.*" (Emphasis added.)

C. Permission to Use the Greek Theatre for Petitioners' "Vietnam Commencement" Was Properly Denied Since the Event as Proposed Would Have Involved Violations of the Selective Service Act.

The Regents have a policy adopted on October 20, 1967, that "University facilities shall not be used for the purpose of organizing or carrying out unlawful activities." (R. 2, lines 6-13.) There can be little doubt as to the validity of this policy. The California Supreme Court has held that school governing officials have ". . . both the right and duty to predetermine that school premises will not be used in contravention of the law . . ."

American Civil Liberties Union v. Board of Education (1963) 59 Cal.2d 203, 213, 379 P.2d 4, cert. denied, 375 U.S. 823.

See also,

Buckley v. Meng (1962) 35 Misc. 2d 467, 224 N.Y. Supp. 2d 136, 138.

Unlawful activity may be so proscribed even though it contains elements of expression, such as the burning of draft cards. (*United States v. O'Brien* (1968) 391 U.S. 367, 20 L.Ed.2d 672.)

The Selective Service Act of 1967 provides in relevant part that any person:

". . . who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces [or] who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ." (50 U.S.C.A. §462 (a).)

Petitioners' organization, the Campus Draft Opposition, prior to the proposed "Vietnam Commencement" had circulated and solicited signatures on two pledges. The first, entitled "Pledge to Refuse Induction," states:

"Our war in Vietnam is unjust and immoral. As long as the United States is involved in this war I will not serve in the Armed Forces." (R. 95.)

The second, entitled "Pledge of Support to Draft Resisters," states:

"Although I am not subject to the draft, my opposition to our government's policy in Vietnam compels me to support those draft-eligible Americans who have pledged to refuse induction. I believe that their decisions are legitimate acts of conscience opposing an unjust and immoral war. I pledge to support those young men with encouragement, counsel, and financial aid." (R. 95.)

The program of the proposed "Vietnam Commencement", as described in petitioners' own promotional

materials for the event, consisted of singling out individuals who had signed the Pledge to Refuse Induction in order to bestow honor upon them and to promise and pledge all support and assistance to them in their resistance to the draft whether by lawful or unlawful means. (R. 68-73.) Such activities, and in particular the promising and making of financial support to those pledging to evade the draft, would be clear violations of the counseling, aiding and abetting provisions of 50 U.S.C. App. §462(a).

Gara v. United States (6 Cir. 1949) 178 F.2d 38, aff'd by an equally divided court, 340 U.S. 857, 95 L.Ed. 628;

Warren v. United States (10 Cir. 1949) 177 F.2d 596, cert. den., 338 U.S. 947, 94 L.Ed. 584;

Bazley v. United States (4 Cir. 1943) 134 F.2d 937.

Petitioners are far from the mark in contending that the activities proposed for the "Vietnam Commencement" are indistinguishable from the speech held constitutionally protected in *Bond v. Floyd* (1966) 385 U.S. 116, 17 L.Ed.2d 235. Mr. Bond's statements, which this Court held could not justify his exclusion from the Georgia House of Representatives, were no more than general and "unclear" remarks critical of the policy of the United States Government regarding Vietnam and of the operation of the Selective Service laws. (385 U.S. at 133-134, 17 L.Ed.2d at 246.) Bond's statements were in no way comparable to the actions proposed by petitioners in the course of the "Vietnam Commencement."

II.

THERE IS NO CONFLICT OF DECISIONS

Petitioners contend that the decision of the court below is in conflict with cases from other circuits holding invalid "speaker bans" on college campuses. In this regard, petitioners cite in particular *Brooks v. Auburn University* (5 Cir. 1969) 412 F.2d 1171, and *Pickings v. Bruce* (8 Cir. 1970) 430 F.2d 595. (Pet. 11, 14.) These and other "speaker ban" cases (cited in the Petition, page 11, fn. 4) have no bearing on the instant case. Each of the "speaker ban" cases involved denials of permission for an individual to appear as a speaker on a college or university campus by reason of his past activities or expressions of views. The instant case involves no such action. At no time did the University deny a request of the Campus Draft Opposition to invite speakers to appear on campus. The University simply denied permission to use the Greek Theatre for the holding of a "Vietnam Commencement" at the time and place and in the manner as proposed by petitioners.

As shown by Appendix A to this brief, Application for Reservation of University Facilities,[2] the fact is that the University granted the petitioners' request for permission to use the Sproul Hall Plaza of the University of California, Berkeley, on May 17, 1968, the very day for which the "Vietnam Commence-

[2]While this document is not a part of the record, it is subject to judicial notice by this Court as a public report, record of document. (*New York Indians v. United States* (1898) 170 U.S. 1, 32 L.Ed. 927, *Thomas v. Ohio State University Trustees* (1904) 195 U.S. 207, 214, 49 L.Ed. 160, 165, *Texas & P. R. Co. v. Pottorf* (1934) 291 U.S. 245, 254, 78 L.Ed. 777, 782.)

ment" was proposed. The stated purpose of that rally was "To promote purposes & program of CDO [Campus Draft Opposition]." The approved off-campus speakers for the rally included Dr. Robert Hutchins, who was to have been a principal speaker at the "Vietnam Commencement." (Pet. 6.)

In no sense then can this case be considered a "speaker ban" case. There is no conflict between the decision below and the decisions in "speaker ban" cases in other circuits.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: January 19, 1971.

Respectfully submitted,

THOMAS J. CUNNINGHAM,

DONALD L. REIDHAAR,

Attorneys for Respondent.

(Appendix A Follows)

Appendix A

University of California Office of Dean of Students
Berkeley Campus

APPLICATION FOR RESERVATION OF UNIVERSITY FACILITIES

Any reservation of University facilities is subject to cancellation for violation of University policies or campus regulations.

The University makes facilities available to registered student organizations only for events directed to the University community. Announcements must be appropriate to that limited purpose. Non-University groups may not participate in the planning or execution of such events without the advance approval of the Dean of Students.

University policies state that University facilities shall not be used for any commercial purpose, for the purpose of religious worship, exercise or conversion, or for the purpose of organizing or carrying out unlawful activity.

Persons reserving a University facility and the officers of the organization are responsible for the observance of all University policies and campus regulations, including prohibitions on smoking and overcrowding.

Name of Organization Campus Draft Opposition and Faculty Peace Committee

Date of Application May 2, 1968

Facility Requested Sproul Steps

Nature of Event (Describe in Detail) Rally

To be held on May 17, 1968, from Noon to 1 pm

Off-Campus Speaker(s) Robert Hutchins - Joan Baez - David Harris

Title of Film(s) ——

Admission Charge $ —— Donations $ ——

Rental Charge

R C Strohman (Signature of Applicant)

4941 (Phone)

Reservation Approved By J D Blais (Signature)

5-2-68 (Date)

Note: Please answer the following:

By what methods will this event be publicized (Describe in detail) Daily Cal, Leaflets, Local Press

How will this event be described in this advertising (Describe in detail) To promote purposes & program of CDO

Note: Any reservation of University facilities is subject to cancellation for misrepresentation of the event for which the facility is sought.

Copy for Dean of Students